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FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6936
DATE COMPLAINT FILED: 4/27/2015
DATE OF NOTIFICATION: 5/6/2015
DATE OF LAST RESPONSE: 7/2/2015
DATE ACTIVATED: 8/21/2015

ELECTION CYCLE: 2016
EARLIEST SOL: 4/13/2020
LATEST SOL: 4/13/2020

COMPLAINANT: Christopher Sheldon

RESPONDENTS: Geoff Charles
94 HJY (WHJY)

**RELEVANT STATUTES
AND REGULATIONS:** 52 U.S.C. § 30120¹
52 U.S.C. § 30101(9)(B)(i)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter concerns a complaint alleging that radio station 94 HJY ("WHJY") and on-air radio personality Geoff Charles ("Charles") (collectively, "Respondents") violated the Federal Election Campaign Act, as amended, (the "Act") by broadcasting a public communication containing express advocacy without a disclaimer stating who paid for it.²

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act") was transferred from Title 2 to new Title 52 of the United States Code.

² Compl. at 1 (Apr. 27, 2015).

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NOTIFICATION

As discussed below, the available information shows that WHJY is a legitimate press entity, unconnected to any political committee, candidate, or party, and Charles's broadcast constitutes legitimate press activity within the scope of the Act's "press exemption." Accordingly, the costs incurred to produce and distribute the broadcast are not "expenditures" within the meaning of the Act and the broadcast was not required to include a disclaimer. We therefore recommend that the Commission find that there is no reason to believe that the Respondents violated 52 U.S.C. § 30120.

II. FACTS

WHJY is a radio station in Providence, Rhode Island, owned and operated by iHeartMedia, Inc. ("iHeartMedia"), a publicly traded media and entertainment company formerly known as Clear Channel Communications, Inc.³ WHJY broadcasts feature numerous radio personalities, who play music and provide news and commentary on air, and disseminate related content on the WHJY website.⁴

WHJY employs Geoff Charles as an on-air personality.⁵ According to the station's website, Charles is a member of the Rhode Island Radio Hall of Fame and had hosted the station's weekday afternoon drive show for almost two decades before assuming his current timeslot on weekdays from 7 p.m. to 9 p.m.⁶ As part of his employment at WHJY, Charles maintains a blog on WHJY's website, which he often reads as an "audio blog" during his radio

³ Resp. at 1 (July 2, 2015).

⁴ *Id.*; see also *On Air*, 94HJY.COM, <http://www.94hgy.com/onair/> (last visited Nov. 10, 2015).

⁵ Resp. at 1.

⁶ *Charles on 94HJY*, 94HJY.COM, <http://www.94hgy.com/onair/> (last visited Nov. 10, 2015); see also Resp. at 1.

1 broadcasts.⁷ The blog, known as "Diary of a Psychotic," is a recurring feature on Charles's
2 broadcasts in which he provides commentary on current events, politics, and other topics.⁸
3 Recent topics have included religious liberty,⁹ government surveillance in the United Kingdom,¹⁰
4 a state ballot initiative to legalize marijuana,¹¹ and daylight savings time.¹²

5 On April 13, 2015, Charles presented one such audio blog, titled "From the White House
6 to the Temple of Doom."¹³ The audio blog appears to provide a list of Presidential Candidate
7 Ted Cruz's positions on various issues, and concludes:

8 So a vote for Ted is a vote to bring America to its knees in supplication to
9 what he deems to be the resurrection of American values and its devotion
10 to its Christian heritage. Meanwhile, any nation who threatens our
11 worldwide rule, will be bombed back into the stone age. A vote for Ted
12 means America inches closer to a plutocratic dictatorship blessed by God.
13 Here's your chance to finally build that temple of doom.¹⁴

⁷ Resp. at 1. The audio blogs appear to be substantially similar to the written blogs that appear on the web site, with limited on-air improvisation from Charles.

⁸ Charles on 94HJY, 94HJY.COM, <http://www.94hgy.com/onair/> (last visited Nov. 10, 2015).

⁹ Geoff Charles, *My Religious Liberty Does Not Take a Back Seat to Your Religious Liberty*, 94HJY.COM, <http://www.94hgy.com/onair/charles-678/blog-110615-14102351/> (Nov. 6, 2015) ("Keep your gods out of our lives and we'll leave them in yours. We promise. Will you make the same commitment? Frankly, I doubt it.").

¹⁰ Charles, *Bond vs. the United Kingdom*, 94HJY.COM, <http://www.94hgy.com/onair/charles-678/blog-110515-14098921/> (Nov. 5, 2015) ("Sounds like fiction but it's not. This is a calculated move by the United Kingdom to spy and collect data on all of its citizens. . . . If it can happen there, it will happen here, and in real life we'll need our own rogue agent, like Bond, to take it down.").

¹¹ Charles, *The Big Blue Sign*, 94HJY.COM, <http://www.94hgy.com/onair/charles-678/blog-110415-14094625/> (Nov. 4, 2015) ("Remember: There are more cops in Ohio than there is [sic] kernels of popcorn at a multi-plex. And keep an eye out for those big, blue signs [that read, 'If you are trafficking drugs you will go directly to prison']. They'll make you sit up in your seat straight as a board.").

¹² Charles, *No Standard Time for Me*, 94HJY.COM, <http://www.94hgy.com/onair/charles-678/blog-11022015-14087730/> (Nov. 2, 2015) ("Get rid of standard time. Keep [Daylight Savings Time] in effect year round. . . . I haven't changed the clock in my car or my watch. I'm staying on DST whether the government likes it or not!").

¹³ Complainant located a transcript of the broadcast, which he attached to the Complaint. Compl. at Attach. A; see also Resp. at Attachs. A & B.

¹⁴ Compl. at Attach. A; see also Resp. at Attachs. A & B.

1 According to the transcript provided by the Respondents, the radio broadcast of the audio blog
2 was followed by a statement that "[t]he views expressed by Charles are his own. . . ."¹⁵ The
3 transcript does not include any statement as to who paid for the broadcast.

4 Complainant characterizes this audio blog as an "advertisement" "listing off facts,
5 allegations and opinions regarding announced Presidential Candidate Ted Cruz [that] clearly and
6 expressly advocated for the defeat of Mr. Cruz."¹⁶ The Complainant alleges that WHJY gave
7 Charles the air time in order to advocate for the defeat of Cruz's presidential campaign, and that,
8 as a public communication containing express advocacy, the communication should have
9 contained a disclaimer in accordance with the Act.¹⁷

10 Respondents assert that the broadcast was not a political advertisement attacking Cruz,
11 but simply a recurring feature on Charles's regular broadcast.¹⁸ Because the "audio blog" was a
12 commentary, Respondents argue, the broadcast was entitled to the Act's "press exemption" for
13 media entities engaging in legitimate press functions and did not require a disclaimer.¹⁹

14 III. LEGAL ANALYSIS

15 Under the Act and Commission regulations, any person that makes a disbursement for a
16 public communication²⁰ that expressly advocates the election or defeat of a clearly identified
17 candidate must include a disclaimer stating who paid for the communication, among other

15 Resp. at Attach A.

16 Compl. at 1.

17 *Id.*

18 Resp. at 1.

19 *Id.* at 1, 5-6.

20 "Public communication" means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. 11 C.F.R. § 100.26.

1 information.²¹ The Act includes specific requirements for communications made through a radio
2 broadcast.²² Nevertheless, when the costs incurred to produce and distribute a communication
3 fall within the press exemption for media entities, they are exempt from the Act's disclosure,
4 disclaimer, and reporting requirements.²³

5 The Act and Commission regulations define the terms "contribution" and "expenditure"
6 to include any gift of money or "anything of value" given for the purpose of influencing a federal
7 election.²⁴ However, the Act exempts from the definition of expenditure "any news story,
8 commentary, or editorial distributed through the facilities of any broadcasting station,
9 newspaper, magazine, or other periodical publication, unless such facilities are owned or
10 controlled by any political party, political committee, or candidate."²⁵

11 To determine whether the press exemption applies, the Commission first assesses
12 whether the entity engaging in the activity is a press or media entity.²⁶ If so, the exemption
13 applies so long as the entity (1) is not owned or controlled by a political party, political
14 committee, or candidate and (2) is acting within its "legitimate press function" in conducting the
15 activity that is the subject of the complaint.²⁷ The inquiry into whether an entity is acting within
16 its "legitimate press function" is guided by two considerations: (1) whether the entity's materials

²¹ 52 U.S.C. § 30102(a); 11 C.F.R. § 110.11.

²² 11 C.F.R. § 110.11(c)(3)-(4).

²³ Advisory Op. 2010-08 at 7 (Citizens United) ("AO 2010-08").

²⁴ 52 U.S.C. § 30101(8)(A), (9)(A); 11 C.F.R. §§ 100.52(a), 100.111(a).

²⁵ 52 U.S.C. § 30101(9)(B)(i).

²⁶ See, e.g. AO 2010-08; Advisory Op. 2008-14 (Melothé, Inc.); Advisory Op. 2005-16 (Fired Up!) ("AO 2005-16"); Advisory Op. 1996-16 (Bloomberg).

²⁷ *Readers Digest Ass'n. v. Fed. Election Comm'n.*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

1 are available to the general public, and (2) whether the challenged materials are comparable in
2 form to those ordinarily issued by the entity.²⁸ In this analysis, an entity otherwise eligible for
3 the exemption does not "lose its eligibility merely because of a lack of objectivity in a news
4 story, commentary, or editorial, even if the news story, commentary, or editorial expressly
5 advocates the election or defeat of a clearly identified candidate for Federal office."²⁹

6 A. Press Entity Status

7 Neither the Act nor Commission regulations use or define the term "press entity";
8 therefore, to determine whether the term applies to a particular entity, the Commission looks to
9 "whether the entity in question produces on a regular basis a program that disseminates news
10 stories, commentary, and/or editorials."³⁰ There does not appear to be any question here that
11 WHJY is a legitimate press entity.³¹ WHJY operates as a radio station 24 hours a day and,
12 although the station bills itself as a music station ("Providence's Home of Rock and Roll"),³² it
13 also consistently features on-air personalities, who routinely share news stories, offer their
14 opinions, and provide commentary on various subjects.³³ Charles in particular appears to share

²⁸ Federal Election Comm'n. v. Mass. Citizens for Life, 479 U.S. 238, 251 (1986); see also *Reader's Digest Ass'n*, 509 F. Supp. at 1215; AO 2005-16 at 4.

²⁹ AO 2005-16 at 6 (citing MUR 5440 (CBS Broadcasting, Inc.) ("Even seemingly biased stories or commentary by a press entity can fall within the media exemption.")).

³⁰ *Id.* at 5.

³¹ Moreover, as noted by the Respondents, the Commission has previously recognized WHJY's parent company, iHeartMedia, Inc. (under its previous name, Clear Channel Communications, Inc.) as a press entity. MUR 6320 (Gomez); MUR 6242 (J.D. Hayworth 2010); MUR 5569 (John & Ken Show). iHeartMedia was not named as a respondent in this case, though counsel for WHJY and Charles represents that his client is iHeartMedia. Resp. at 1. In view of our recommended disposition, see *infra*, we do not recommend generating iHeartMedia as a respondent in this matter. See MUR 5569 (John & Ken Show) at n. 1.

³² See 94HJY.COM, <http://www.94hgy.com/main.html> (last visited Oct. 5, 2015).

³³ Resp. at 1; 94HJY.COM, <http://www.94hgy.com/main.html> (last visited Oct. 5, 2015; see also AO 2007-07 (MTV) (concluding that MTV was a press entity, notwithstanding its musical programming, such as music videos, movies, concerts, awards shows and other non-commentary content.)

1 his "Diary of a Psychotic" commentary approximately three times per week, frequently
2 addressing political topics.³⁴ WHJY's website also provides regular access to news and
3 commentary.³⁵ Accordingly, WHJY appears to be a press entity.³⁶

4 **B. Ownership Criteria**

5 There is no indication that WHJY is owned or controlled by a political party, political
6 committee, or candidate. WHJY is owned and operated by iHeartMedia, a publicly-traded global
7 media and entertainment company. Although iHeartMedia has a PAC, there is no suggestion
8 that the committee owns or controls WHJY.³⁷ When iHeartMedia was known as Clear Channel
9 Communications, Inc. it was named a respondent in three matters and, in each instance, the
10 Commission concluded that Clear Channel was a press entity covered by the press exemption.³⁸

11 **C. Legitimate Press Functions**

12 This leaves only the question of whether WHJY (with Charles, as its agent) was acting
13 within its "legitimate press function" in disseminating the blog that is the subject of the
14 complaint. As required under this standard, both the broadcast and the transcript posted on

³⁴ Charles on 94HJY, 94HJY.COM, <http://www.94hjy.com/main.html> (last visited Nov. 10, 2015).

³⁵ 94HJY.COM, <http://www.94hjy.com/main.html> (last visited Sept. 4, 2015). The Commission has previously found that websites that provide access to news, commentaries and editorials are "press entities." AO 2005-16; Advisory Op. 2000-13 (iNEXTV); see also MUR 5569 (John & Ken Show) (in which a radio program found to qualify for the press exemption posted content to a website associated with the show).

³⁶ At this time, it is unnecessary to determine whether Charles is a press entity in his own right, as he appears to have been acting as an agent of WHJY when he broadcasted "From the White House to the Temple of Doom." The Commission has routinely applied a press exemption granted to a radio station or its parent company to activities of the station's on-air personalities that were undertaken during the ordinary course of the individual's employment. See MUR 6604 (Wilson-Foley); MUR 6320 (Gomez); MUR 6242 (J.D. Hayworth); MUR 5569 (John & Ken Show); MUR 5555 (Ross).

³⁷ iHeartMedia also established a leadership PAC – iHeartMedia, Inc. – Clear Channel Outdoor Leadership PAC – but it terminated its registration with the Commission on July 27, 2015.

³⁸ MUR 6320 (Gomez); MUR 6242 (J.D. Hayworth); MUR 5569 (John & Ken Show).

1 WHJY's website were available to the general public. Notably, the Complainant is a member of
2 the general public and appears to have accessed both.

3 As to whether the challenged materials are comparable in form to those ordinarily issued
4 by the press entity, the blog entry, in both its written and audio formats, appears to be consistent
5 with the content ordinarily disseminated by Charles and WHJY. First, the format of "From the
6 White House to the Temple of Doom" appears to be consistent with the typical format of both
7 the "Diary of a Psychotic" blog and Charles's show in general.³⁹ The available information
8 suggests that Charles's show customarily includes "talk radio" portions, and that the "Diary of a
9 Psychotic" segment in particular airs on a regular basis, several times per week, dating back to at
10 least 2008.⁴⁰ Moreover, the "Diary of a Psychotic" segment routinely includes commentary on
11 political candidates, races, and officeholders comparable to the content included in "From the
12 White House to the Temple of Doom."⁴¹

13 WHJY's distribution of "From the White House to the Temple of Doom" also appears to
14 be consistent with the station's typical practices.⁴² WHJY asserts that it disseminated this
15 particular entry in "precisely the same way that it disseminates content by its other on-air

³⁹ See MUR 6320 (Gomez) (using consistency of a format as an indicia of comparable form); MUR 6242 (J.D. Hayworth) (same); MUR 6604 (Wilson-Foley) (same).

⁴⁰ On Air: *Charles on 94HJY*, 94HJY.COM, www.94hgy.com/onair/charles-678/ (last visited Nov. 10, 2015) (displaying approximately three to four "Diary of a Psychotic" segments per week); see also *Archive of Diary of a Psychotic*, 94HJY.COM, http://www.94hgy.com/podcast/charles_blog.xml (last visited Nov. 19, 2015) (compiling recordings of "Diary of a Psychotic" segments dating back to October 13, 2008).

⁴¹ On Air: *Charles 94HJY*, 94HJY.COM, www.94hgy.com/onair/charles-678/ (last visited Nov. 10, 2015) (showing blog entries such as "She's Toast," regarding Hillary Clinton's presidential bid; "Trumped," on Donald Trump's presidential bid; and "All American Ignoramuses" on presidential candidates, generally).

⁴² See MUR 6320 (citing consistency in the method of dissemination as an indicator of "comparable form"); see also Advisory Op. 2011-11 (Colbert) ("AO 2011-11") (same).

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1 personalities: radio broadcasts and website postings.”⁴³ Indeed, the audio blog appears to have
2 aired during Charles’s usual time slot, and is available in the same location of WHJY’s website
3 as Charles’s other blog entries.⁴⁴ All of these factors indicate that WHJY was acting in its
4 legitimate press function when it made the “From the White House to the Temple of Doom”
5 communication.

6 Based on the above analysis, WHJY appears to be a press entity, unconnected to any
7 political committee, candidate, or party, and its broadcast of the “From the White House to the
8 Temple of Doom” piece constitutes legitimate press activity within the scope of the Act’s “press
9 exemption.” Accordingly, the costs incurred to produce and distribute the broadcast are not
10 “expenditures” within the meaning of the Act and the broadcast was not required to include a
11 disclaimer. We therefore recommend that the Commission find no reason to believe the
12 Respondents violated 52 U.S.C. § 30120.

⁴³ Resp. at 5.

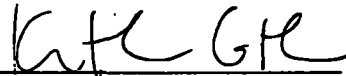
⁴⁴ *Id.* Though not stated, this tends to suggest that the radio station used, for example, the same facilities, staff, and review process that it uses for all other on-air commentary. AO 2011-11 (noting each of these factors as indicia of consistency of form); *see also* First MUR 6779 (Gilbert) (currently on circulation); MUR 5928 (Daily Kos).

IV. RECOMMENDATIONS

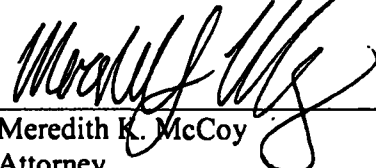
1. Find no reason to believe that WHJY or Geoff Charles violated 52 U.S.C. § 30120.
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letters.
4. Close the file.

Date

11-19-15


Kathleen M. Guith
Acting Associate General Counsel
for Enforcement


Peter G. Blumberg
Assistant General Counsel


Meredith K. McCoy
Attorney